

## PART IV—CRIMES AND ELEMENTS

### **(950p) – Statement of substantive offenses**

This part of the Manual provides guidance with respect to crimes that may be tried by military commission and enumerates the elements of those crimes.

#### **1. (Section 950q) – Principals**

a. *Text.* “Any person is punishable as a principal under this chapter who—

- (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;
- (2) causes an act to be done which if directly performed by him would be punishable by this chapter; or
- (3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

#### **2. (Section 950r) – Accessory after the fact**

a. *Text.* “Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) That an offense punishable by the M.C.A. was committed by a certain person;
- (2) That the accused knew that this person had committed such an offense;
- (3) That thereafter the accused received, comforted, or assisted the offender; and
- (4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

c. *Maximum punishment.* Any person subject to this chapter who is found guilty as an accessory after the fact to an offense punishable by the M.C.A. shall be subject to the maximum punishment authorized for the principle offense, except that in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

#### **3. (Section 950s) – Conviction of lesser included offense**

a. *Text.* “An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an attempt to commit either the

offense charged or an offense necessarily included therein.”

#### **4. (Section 950t) – Attempts**

a. *Text.* “(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.”

b. *Elements.*

- (1) That the accused did a certain overt act;
- (2) That the act was done with the specific intent to commit a certain offense under the M.C.A.;
- (3) That the act amounted to more than mere preparation; and
- (4) That the act apparently tended to effect the commission of the intended offense.

c. *Maximum punishment.* Any person subject to this chapter who is found guilty of an attempt under Section 950t to commit any offense punishable by this chapter shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged.

#### **5. (Section 950u) – Solicitation**

a. *Text.* “Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) That the accused wrongfully solicited, ordered, induced, or advised a person or persons to commit a substantive offense triable by military commission; and
- (2) That the accused intended that the offense actually be committed.

c. *Maximum punishment.* Confinement for 10 years.

## 6. (Section 950v) – Crimes triable by military commissions

(a) DEFINITIONS AND CONSTRUCTION.—In this section:

(1) MILITARY OBJECTIVE.—The term ‘military objective’ means—

(A) combatants; and

(B) those objects during an armed conflict—

(i) which, by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability; and

(ii) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

(2) PROTECTED PERSON.—The term ‘protected person’ means any person entitled to protection under one or more of the Geneva Conventions, including—

(A) civilians not taking an active part in hostilities;

(B) military personnel placed *hors de combat* by sickness, wounds, or detention; and

(C) military medical or religious personnel.

(3) PROTECTED PROPERTY.—The term ‘protected property’ means property specifically protected by the law of war (such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected), if such property is not being used for military purposes or is not otherwise a military objective. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions, but does not include civilian property that is a military objective.

### (1) MURDER OF PROTECTED PERSONS.

a. *Text.* “Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused without justification or excuse, intentionally and unlawfully kills a protected person;

(2) The accused knew or should have known of the factual circumstances that established that person’s protected status; and

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

c. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

d. *Maximum punishment.* Death.

## **(2) ATTACKING CIVILIANS.**

a. *Text.* “Any person subject to this chapter who intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused engaged in an attack;
- (2) The object of the attack was a civilian population as such, or individual civilians not taking direct or active part in hostilities;
- (3) 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;
- (4) The accused knew or should have known of the factual circumstances that established the civilian status; and
- (5) The attack took place in the context of and was associated with armed conflict.

c. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the attack on civilians. Otherwise, confinement for life.

## **(3) ATTACKING CIVILIAN OBJECTS.**

a. *Text.* “Any person subject to this chapter who intentionally engages in an attack upon a civilian object that is not a military objective shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused engaged in an attack;
- (2) The object of the attack was civilian property, that is, property that was not a military objective;
- (3) The accused intended such civilian property to be an object of the attack;
- (4) The accused knew or should have known that such property was not a military objective; and
- (5) The attack took place in the context of and was associated with armed conflict.

c. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

d. *Maximum punishment.* Confinement for 20 years.

#### **(4) ATTACKING PROTECTED PROPERTY.**

a. *Text.* “Any person subject to this chapter who intentionally engages in an attack upon protected property shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused engaged in an attack;
- (2) The object of the attack was protected property;
- (3) The accused intended such protected property to be an object of the attack;
- (4) The accused knew or should have known of the factual circumstances that established the property’s protected status; and
- (5) The attack took place in the context of and was associated with armed conflict.

c. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

d. *Maximum punishment.* Confinement for 20 years.

#### **(5) PILLAGING.**

a. *Text.* “Any person subject to this chapter who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused appropriated or seized certain property;
- (2) The accused intended to appropriate or seize such property for private or personal use;
- (3) 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
- (4) The appropriation or seizure took place in the context of and was associated with armed conflict.

c. *Maximum punishment.* Confinement for 20 years.

#### **(6) DENYING QUARTER.**

a. *Text.* “Any person subject to this chapter who, with effective command or control over subordinate groups, declares, orders, or otherwise indicates to those groups that there shall be no survivors or surrender accepted, with the intent to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;
- (2) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;
- (3) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;
- (4) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and
- (5) The conduct took place in the context of and was associated with armed conflict.

c. *Maximum punishment.* Confinement for life.

**(7) TAKING HOSTAGES.**

a. *Text.* “Any person subject to this chapter who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or 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, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused seized, detained, or held hostage one or more persons;
- (2) The accused threatened to kill, injure, or continue to detain such person or persons;
- (3) 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; and
- (4) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.* This offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by law of armed conflict.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the hostage taking. Otherwise, confinement for life.

**(8) EMPLOYING POISON OR SIMILAR WEAPONS.**

a. *Text.* “Any person subject to this chapter who intentionally, as a method of warfare, employs a substance or weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be punished, if death results to one or more of the victims, by death or such

other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused intentionally employed a substance or a weapon that releases a substance as a result of its employment;
- (2) The substance was such that causes death or serious damage to health in the ordinary course of events through its asphyxiating, poisonous, bacteriological properties;
- (3) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, bacteriological properties as a method of warfare;
- (4) The accused knew or should have known of the nature of the substance or weapon employed; and
- (5) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) The “death or serious damage to health” required of the offense 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).
- (2) The clause “serious damage to health” does not include temporary incapacitation or sensory irritation.
- (3) 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.
- (4) 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).

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the employment of the substance or weapon. Otherwise, confinement for life.

**(9) USING PROTECTED PERSONS AS A SHIELD.**

a. *Text.* “Any person subject to this chapter who positions, or otherwise takes advantage of, a protected person with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused positioned or took advantage of the location of a protected person;
- (2) The accused did so with the intent to shield a military objective from attack or to

shield, favor, or impede military operations; and

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

c. *Maximum punishment.* Death, if the death of any person occurs as a result of the use of a protected person as a shield. Otherwise, confinement for life.

#### **(10) USING PROTECTED PROPERTY AS A SHIELD.**

a. *Text.* “Any person subject to this chapter who positions, or otherwise takes advantage of the location of, protected property with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused positioned or otherwise took advantage of the location of protected property;

(2) The accused did so with the intent to shield a military objective from attack, or to shield, favor, or impede military operations; and

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

c. *Maximum punishment.* Confinement for life.

#### **(11) TORTURE.**

a. *Text.* “Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(2) The accused did so for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind;

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

(4) The infliction of pain or suffering was not incidental to lawful sanctions;

(5) Such person or persons were in the custody or under the control of the accused at the time of the alleged offense; and

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

c. *Explanation.*

(1) This offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed sanctions or punishments. This offense does not include the incidental infliction of pain or suffering associated with the lawful conduct of hostilities.

(2) Severe “mental pain or suffering” is the prolonged mental harm caused by or resulting from:

- (a) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (b) 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;
- (c) the threat of imminent death; or
- (d) 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.

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

(4) Element (b)(4) of this offense 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.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the torture. Otherwise, confinement for life.

**(12) CRUEL OR INHUMAN TREATMENT.**

a. *Text.* “Any person subject to this chapter who commits an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control shall be punished, if death results to the victim, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to the victim, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused wrongfully and unlawfully inflicted severe or serious physical or mental pain or suffering upon one or more persons;

(2) The accused intended to inflict such severe or serious physical or mental pain or suffering upon the person;

(3) The infliction of such pain or suffering was not incidental to lawful sanctions;

(4) Such person or persons were in the custody or under the control of the accused at the time of the alleged offense; and

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

c. *Definitions.*

- (1) The term “serious physical pain or suffering” means bodily injury that involves—
  - (A) a substantial risk of death;
  - (B) extreme physical pain;
  - (C) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
  - (D) significant loss or impairment of the function of a bodily member, organ, or mental faculty.
- (2) The term “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—
  - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
  - (B) 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;
  - (C) the threat of imminent death; or
  - (D) 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;
- (3) The term “serious mental pain or suffering” means the prolonged mental harm (if the alleged act occurred prior to or on October 17, 2006) or serious and non-transitory mental harm which need not be prolonged (if the alleged act occurred after October 17, 2006) caused by or resulting from—
  - (A) the intentional infliction or threatened infliction of serious physical pain or suffering;
  - (B) 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;
  - (C) the threat of imminent death; or
  - (D) the threat that another person will imminently be subjected to death, serious physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

d. *Comment.* The intent required for this offense precludes its applicability with regard to collateral damage or death, damage, or injury incident to a lawful attack.

e. *Maximum punishment.* Death, if the death of any person occurs as a result of the cruel or inhuman treatment. Otherwise, confinement for life.

### **(13) INTENTIONALLY CAUSING SERIOUS BODILY INJURY.**

a. *Text.* “Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused caused serious injury to the body or health of one or more persons;
- (2) The accused intended to inflict such serious injury upon the person or persons;
- (3) The injury was done with unlawful force or violence;
- (4) The serious bodily injury inflicted by the accused was in violation of the law of war; and
- (5) The conduct took place in the context of and was associated with armed conflict.

c. *Definition.* **SERIOUS BODILY INJURY DEFINED.**— the term ‘serious bodily injury’ means bodily injury which involves—

- (i) a substantial risk of death;
- (ii) extreme physical pain;
- (iii) protracted and obvious disfigurement; or
- (iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

d. *Comment.* For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy. It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war.

e. *Maximum punishment.* Death, if the death of any person occurs as a result of the serious bodily injury. Otherwise, 20 years confinement.

### **(14) MUTILATING OR MAIMING.**

a. *Text.* “Any person subject to this chapter who intentionally injures one or more protected persons by disfiguring the person or persons by any mutilation of the person or persons, or by permanently disabling any member, limb, or organ of the body of the person or persons, without any legitimate medical or dental purpose, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused injured one or more persons by permanently disfiguring the person or persons or by permanently disabling any member, limb, or organ of the body of the person or persons;
- (2) The accused intended to subject such person or persons to such mutilation;
- (3) The person or persons was or were protected persons;
- (4) The injuries were done with unlawful force and violence;
- (5) The conduct caused the death or seriously damaged or endangered the physical health or mental health or physical appearance of such person or persons;
- (6) The injuries did not have any legitimate medical or dental purpose; and
- (7) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.* It is mutilation or maiming to put out a person's eye, to cut off a hand, foot, or finger, or to knock out a tooth, as these injuries destroy or disable those members or organs. It is also mutilation or maiming to injure an internal organ so as to seriously diminish the physical vigor of a person. Likewise, it is mutilation or maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure a person. A disfigurement need not mutilate any entire member to come within the article, or be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the mutilation or maiming. Otherwise, confinement for 20 years.

**(15) MURDER IN VIOLATION OF THE LAW OF WAR.**

a. *Text.* "Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct."

b. *Elements.*

- (1) One or more persons are dead;
- (2) The death of the persons resulted from the act or omission of the accused;
- (3) The killing was unlawful;
- (4) The accused intended to kill the person or persons;
- (5) The killing was in violation of the law of war; and
- (6) The killing took place in the context of and was associated with an armed conflict.

c. *Comment.* See comment to "Intentionally Causing Serious Bodily Injury."

d. *Maximum punishment.* Death.

**(16) DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR.**

a. *Text.* “Any person subject to this chapter who intentionally destroys property belonging to another person in violation of the law of war shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused destroyed property;
- (2) The property belonged to another person;
- (3) The accused destroyed the property without that person’s consent;
- (4) The accused intended to destroy such property;
- (5) The destruction of the property was in violation of the law of war; and
- (6) The destruction took place in the context of and was associated with an armed conflict.

c. *Comment.* A “violation of the law of war,” may be established by proof of the status of the accused as an unlawful combatant or by proof of the character of the property destroyed, or both.

d. *Maximum punishment.* Confinement for 10 years.

**(17) USING TREACHERY OR PERFIDY.**

a. *Text.* “Any person subject to this chapter who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused invited the confidence or belief of one or more persons that they were entitled, or obliged to accord, protection under the law of war;
- (2) The accused intended to betray that confidence or belief;
- (3) The accused killed, injured or captured one or more persons;
- (4) The accused made use of that confidence or belief in killing, injuring or capturing such person or persons; and
- (5) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) Ruses of war are legitimate so long as they do not involve treachery or perfidy on the part of the belligerent resorting to them. They are, however, forbidden if they contravene any generally accepted rule.

(2) The line of demarcation between legitimate ruses and forbidden acts of perfidy is sometimes indistinct, but the following examples indicate the correct principles. It would be an improper practice to secure an advantage of the enemy by deliberate lying or misleading conduct which involves a breach of faith, or when there is a moral obligation to speak the truth. For example, it is improper to feign surrender so as to secure an advantage over the opposing belligerent thereby. So similarly, to broadcast to the enemy that an armistice had been agreed upon when such is not the case would be treacherous. On the other hand, it is a perfectly proper ruse to summon a force to surrender on the ground that it is surrounded and thereby induce such surrender with a small force.

(3) Treacherous or perfidious conduct in war is forbidden because it destroys the basis for a restoration of peace short of the complete annihilation of one belligerent by the other.

(4) One may commit an act of treachery or perfidy by, for example, feigning an intent to negotiate under a flag of truce or a surrender or feigning incapacitation by wounds or sickness or feigning a civilian, non-combatant status or feigning a protected status by the use of signs, emblems, or uniforms of the United Nations or a neutral State or a State not party to the conflict.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the improper use of the treachery or perfidy. Otherwise, confinement for life.

#### **(18) IMPROPERLY USING A FLAG OF TRUCE.**

a. *Text.* “Any person subject to this chapter who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise suspend hostilities when there is no such intention shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused used a flag of truce;

(2) The accused made such use of the flag in order to feign an intention to negotiate, surrender, or otherwise suspend hostilities;

(3) The accused had no intention to negotiate, surrender, or otherwise suspend hostilities; and

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

c. *Maximum punishment.* Confinement for 20 years.

#### **(19) IMPROPERLY USING A DISTINCTIVE EMBLEM.**

a. *Text.* “Any person subject to this chapter who intentionally uses a distinctive emblem recognized by the law of war for combatant purposes in a manner prohibited by the law of war shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused used a distinctive emblem recognized by the law of war for combatant purposes;
- (2) The accused used the distinctive emblem in a manner prohibited by the law of war;
- (3) The accused knew or should have known of the prohibited nature of such use; and
- (4) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) “Combatant purposes,” means purposes directly related to hostilities and does not include medical, religious, or similar activities.
- (2) The use of the emblem of the Red Cross and other equivalent insignia must be limited to the indication or protection of medical units and establishments, the personnel and material protected by the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces of the Field* and other similar conventions. The following are examples of the improper use of the emblem: using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants; displaying the emblem on vehicles containing ammunition or other non-medical stores; and in general using it for cloaking acts of hostility.

d. *Maximum punishment.* Confinement for 20 years.

**(20) INTENTIONALLY MISTREATING A DEAD BODY.**

a. *Text.* “Any person subject to this chapter who intentionally mistreats the body of a dead person, without justification by legitimate military necessity, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused mistreated or otherwise violated the dignity of the body of a dead person;
- (2) The accused’s actions were not justified by legitimate military necessity;
- (3) The accused intended to mistreat or violate the dignity of such body; and
- (4) This act took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) This offense is designed to criminalize only the most serious conduct.
- (2) To mistreat or otherwise violate the dignity of the body of a dead person requires severe physical desecrations, such as dismemberment, sexual or other defilement, or mutilation of dead bodies, especially if publicly displayed, that, as a result, do not respect the remains of the deceased; it does not include photography of a corpse unaccompanied by acts of severe disrespect.

d. *Maximum punishment.* Confinement for 20 years.

**(21) RAPE.**

a. *Text.* “Any person subject to this chapter who forcibly or with coercion or threat of force wrongfully invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused wrongfully 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;
- (2) The invasion was committed by force, threat of force or coercion or against a person incapable of giving consent; and
- (3) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) This offense recognizes that consensual conduct does not give rise to this offense.
- (2) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.
- (3) The concept of “invasion” is linked to the inherent wrongfulness requirement. In this case, for example, a legitimate body cavity search could not give rise to this offense.
- (4) The concept of “invasion” is gender neutral.

d. *Maximum punishment.* Confinement for life.

**(22) SEXUAL ASSAULT OR ABUSE.**

a. *Text.* “Any person subject to this chapter who forcibly or with coercion or threat of force engages in sexual contact with one or more persons, or causes one or more persons to engage in sexual contact, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused wrongfully engaged in sexual contact with one or more persons or wrongfully caused one or more persons to engage in sexual contact;
- (2) The sexual contact was committed by force, threat of force or coercion or against a person incapable of giving consent; and
- (3) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.* Sexual assault or abuse is defined as intentional sexual contact, characterized by use of force, physical threat of force or abuse of authority or when the victim does not or cannot

consent. Sexual assault includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim.

d. *Maximum punishment.* Confinement for life.

### **(23) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT.**

a. *Text.* “Any person subject to this chapter who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of a vessel or aircraft that is not a legitimate military objective shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused seized, exercised control over, or endangered the safe navigation of a vessel, or an aircraft;
- (2) The accused intended to seize, exercise control over, or endanger the safe navigation of such vessel or aircraft;
- (3) The vessel or aircraft was not a legitimate military objective; and
- (4) The conduct took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) *General.* 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) *Hazard.* “Hazard” means to put in danger of loss or injury. Actual damage to, or loss of, a vessel or aircraft by collision, stranding, running upon a shoal or a rock, or by any other cause, is conclusive evidence that the vessel or aircraft was hazarded but not of the fact of culpability on the part of any particular person. Hazarding a vessel or aircraft includes shooting at it with missiles, firearms, laser devices, or attacking it with other instruments intended to endanger the safe navigation of the vessel or aircraft.

d. *Maximum punishment.* Death, if the death of any person occurs as a result of the hijacking or hazarding of a vessel or aircraft. Otherwise, confinement for life.

### **(24) TERRORISM.**

a. *Text.* “Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct,

shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evinced a wanton disregard for human life;
- (2) The accused did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct; and
- (3) The killing, harm or wanton disregard for human life took place in the context of and was associated with armed conflict.

c. *Comment.*

- (1) This offense includes the concept of causing death or bodily harm, even if indirectly.
- (2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the terrorist act. Otherwise, confinement for life.

**(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.**

a. *Text.* “Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.”

b. *Elements.* The elements of this offense can be met either by meeting (i) all of the elements in A, or (ii) all of the elements in B, or (iii) all of the elements in both A and B:

- A. (1) The accused provided material support or resources to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24));
- (2) The accused knew or intended that the material support or resources were to be used for those purposes; and
- (3) The conduct took place in the context of and was associated with an armed conflict.

*or*

- B. (1) The accused provided material support or resources to an international terrorist organization engaged in hostilities against the United States;
- (2) The accused intended to provide such material support or resources to such an international terrorist organization;
- (3) The accused knew that such organization has engaged or engages in terrorism; and
- (4) The conduct took place in the context of and was associated with an armed conflict.

c. *Definition.* “Material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

d. *Maximum Punishment.* Confinement for life.

## **(26) WRONGFULLY AIDING THE ENEMY.**

a. *Text.* “Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused aided the enemy;
- (2) The accused intended to aid the enemy;
- (3) At the time of the accused’s actions, the accused had an allegiance or duty to the United States;
- (4) The accused’s acts and intentions, taken together, comprised a breach of the accused’s allegiance or duty to the United States; and
- (5) The conduct took place in the context of and was associated with an armed conflict.

c. *Comment.*

- (1) The means the accused can use to aid the enemy include but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.
- (2) The requirement that conduct be wrongful for the crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence quarters in accordance with applicable orders or policy is not aiding the enemy.
- (3) The requirement that conduct be wrongful for this crime may necessitate that the accused owe allegiance or some duty to the United States of America. For example,

citizenship, resident alien status, or a contractual relationship in or with the United States is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

d. *Maximum punishment.* Confinement for life.

**(27) SPYING.**

a. *Text.* “Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused collected or attempted to collect certain information by clandestine means or while acting under false pretenses;
- (2) The accused intended or had reason to believe the information collected would be used to injure the United States or to provide an advantage to a foreign power;
- (3) The accused intended to convey such information to an enemy of the United States or one of the co-belligerents of the enemy; and
- (4) The conduct took place in the context of and was associated with armed conflict.

c. *Maximum punishment.* Death.

**(28) CONSPIRACY.**

a. *Text.* “Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

- (1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;
- (2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and

(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

c. *Comment.*

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact “triable by military commission.” Although the accused must be subject to the MCA, other co-conspirators need not be.

(3) The overt act must be done by the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. It is not essential that any substantive offense, including the object offense, be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the conspiracy

or joint enterprise. Otherwise, confinement for life.

**(29) (Section 950w) – PERJURY, FALSE TESTIMONY, AND OBSTRUCTION OF JUSTICE**

**(a) Perjury and false testimony**

a. *Text.* “A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice related to military commissions under this chapter.”

b. *Elements.*

- (1) The accused testified at a military commission, testified in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;
- (2) Such testimony or information was material;
- (3) Such testimony or information was false;
- (4) The accused knew such testimony or information to be false.

c. *Maximum Punishment.* Confinement for 5 years.

**(b) Obstruction of Justice.**

a. *Text.* “A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice related to military commissions under this chapter.”

b. *Elements.*

- (1) The accused did an act;
- (2) The accused intended to influence, impede, or otherwise obstruct the due administration of justice; and
- (3) The accused did such act in the case of a certain person against whom the accused had reason to believe:
  - (A) there were or would be proceedings before a military commission; or
  - (B) there was an ongoing investigation of offenses triable by military commission.

c. *Maximum punishment.* Confinement for 5 years.