

SUPPORT FOR THE PROPOSED ROME STATUTE AMENDMENT TO INCLUDE STARVATION AS A WAR CRIME IN A NON-INTERNATIONAL ARMED CONFLICT

May 2019 Policy Paper in Support of the Proposed Amendment:

Paper 1 of 3



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<https://www.starvationaccountability.org/> will release three reasons to support the amendment sequentially in May, June and the beginning of July 2019 to mirror the dates when the Working Group on Amendments of the Assembly of State Parties (ASP) to the International Criminal Court (ICC) will meet to discuss the proposed amendment. Thereafter, and until the ASP meeting in December 2019, it will continue to feature articles and interviews linked to the proposed amendment, including with Matthias Lanz-Pedretti, Deputy Head of the International Humanitarian Law and International Criminal Justice Section of the Federal Department of Foreign Affairs of Switzerland.

Most instances of starvation occurring today are in the context of a non-international armed conflict (NIAC), the victims of starvation in Yemen, Syria, South-Sudan, north-eastern Nigeria, and Somalia, to name but a few, will, on that basis alone, be denied access to international justice under the current Rome Statute, Article 8 framework.

The prohibition of starvation in the Additional Protocols to the four Geneva Conventions, adopted in 1977, applies to both international armed conflict (IAC) and NIACs.¹ The same prohibition exists under international humanitarian law (IHL) for both types of conflicts,² and is criminalised under customary international law (CIL).³ This reflects the identical human cost of the crime, regardless of the characterisation of the conflict. Nonetheless, the drafting history of Article 8(2)(b)(xxv) of the Rome Statute provides no indication as to why starvation was criminalised only in an IAC including, importantly, why it departed from the aforementioned position under IHL.⁴ Notably, one of the original drafts of the Rome Statute did include a provision that criminalisation in NIAC. However, for reasons that are difficult to discern, the final draft of the Rome Statute did not include it.⁵

To counter the obvious accountability gap that this limitation creates, in 2018 Switzerland proposed an amendment to the Rome Statute to include starvation within the list of war crimes capable of being committed in a NIAC.⁶ The language proposed mirrors almost identically the crime as it is drafted in Article 8(2)(b)(xxv) save for a minor technical correction.⁷ The proposal has been deferred to the 18th session of the Assembly of State Parties to the Rome Statute (December 2019).⁸

The importance of this amendment to countering impunity and as a springboard towards effective accountability for starvation crimes worldwide cannot be overstated.

Reason One: Protection of Civilians

The proposed amendment underscores a commitment to the protection of civilians, a longstanding United Nations Security Council (UNSC) objective implemented in UN S/RES1265 and which commemorated its twenty-year anniversary in May 2019.⁹ The prohibition of the use of Starvation as a method of warfare has been embedded within the framework of the Protection of Civilians Agenda by UN S/RES/2417 (UNSC 2417) championed by The Kingdom of the Netherlands, and passed unanimously in May 2018.¹⁰ This Resolution recognised the need to add into the scope of work of the UNSC, the issue of conflict-induced hunger.

This year, the implementation of UNSC Res 2417 within the agenda of the Protection of Civilians has been discussed during the celebration for the twentieth anniversary of UNSC Res 1265 at the High-Level Side Event "Enhancing the Implementation of Resolution 2417: Lessons Learned From the Past Year" in New York, on 22 May 2019, where GRC's Catriona Murdoch was a keynote speaker alongside other distinguished representatives from the Netherlands, Côte D'Ivoire and panelists from UN World Food Programme, UN Office of the Humanitarian Affairs and Action Against Hunger.

There can be no doubt that the amendment is squarely aligned with the fundamental principles of IHL that demands the protection of civilians and civilian objects regardless of the technical characterisation of the conflict in which they find themselves embroiled.¹¹ As the seminal case of Tadić at the International Criminal Court for the Former Yugoslavia (ICTY) highlighted,

"What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife".¹²

The items inserted in the Protection of Civilians agenda share other intrinsic links with the prohibition of starvation. Notably the need to grant access to the civilian population for humanitarian organisations, in order to ensure relief supplies to reach civilians. The delivery of such supplies cannot be ensured if humanitarian workers are not protected from attacks and are not allowed to operate safely in conflict zones. The same holds true with regard to health workers, who provide lifesaving procedures to civilians and *hors de combat*.

The Protection of Civilians agenda has focused extensively on the need of protecting humanitarian and health personnel, which are constantly and increasingly under attack. The demand for protection and safety of this personnel has also been recently discussed during the UNSC Arria Formula Meeting on Protection of Humanitarian and Medical personnel held on the 1st of April 2019. The discussions recognised the correlating impact between the resurgence of the use of starvation as a method of warfare and the continuous obstacles posed to humanitarian and health workers, including attacks against such personnel.

In sum, the Protection of Civilians agenda and States' commitment to it, is a compelling reason to support the proposed amendment to the Rome Statute, ensuring that civilians are robustly protected across all types of conflicts.

Countering the Pushback

There is in general strong support for the substance of the proposal from the majority of State delegates. Although some reservations have been raised, in this policy paper we will consider briefly concerns revolving the proposed review of the ICC and criticisms of the institution more generally.¹³

Criticism levied against the ICC and the withdrawal of State parties in 2016 and 2018 have been discussed again recently, in addition to the many challenges that the Court has encountered over the last few years. The first four presidents of the ICC ASP have called for "an independent assessment of the court's functioning by a small group of international experts"¹⁴ after the release of the much-criticised decision on Afghanistan, where the Pre-Trial Chamber decided not to authorise the opening of an investigation in Afghanistan, generating considerable controversy. Whilst reform may be warranted and strengthening of processes necessary, such debates should not impede advancements in international justice to ensure accountability for the gravest crimes.

In our view, it is when the very foundations of an institution are being questioned, that the international community need to show its support in continuing the fight against impunity. Leaving the principal international body capable of addressing violations of war crimes without jurisdiction over the war crime of starvation, will not solve its current problems. On the contrary, the inconsistency between CIL and the Rome Statute, will only exacerbate the ICC's critics, providing them with another pretext to undermine the ICC.

Showing support to the ICC in this fragile moment, will contribute to prove that, despite the challenges and the controversies, the ICC is still needed to investigate and prosecute the most serious crimes, such as the deliberate starvation of civilians. Moreover, it is arguable that strong criticisms against the ICC as a whole, lend itself more logically to membership issues rather than within a debate on amendments to the existing Rome Statute.

How to Support the Amendment

It is fundamental to receive global support over the next six months preceding the official proposal of the amendment to the Assembly of State Parties in December 2019. In this paper we highlight three key ways to support the amendment:

1. engage with decision makers and organisations working on advocacy building in order to ensure that the support for this amendment is shared across a wide range of platforms and networks.
2. engage with humanitarian actors and further understanding on the link between food insecurity and the obstruction of humanitarian access.
3. understand and promote that the lack of a reference to the Geneva Conventions in the proposed amendment, does not change the current legal prohibition.

First, the importance of this amendment must not be relegated in light of other debates about the role of the ICC. It is important to engage with decision makers and organisations working on advocacy building in order to ensure that the support for this amendment is shared across a wide range of platforms and networks.

Second, it is also fundamental to engage with humanitarian actors and further understanding on the link between food insecurity and the obstruction of humanitarian access. This link is undeniable and must be stressed by those lobbying for the amendment. The constant impediment of relief in times of conflict is a practice that must be brought to an end, and the inclusion of the criminalisation of this behavior in NIACs is a first step towards accountability.

Third, it is also important to highlight that the lack of a reference to the Geneva Conventions in the proposed amendment, does not change the current legal prohibition.¹⁵ Even without reference to the Geneva Conventions, the new provision in the ICC Statute will prohibit the obstruction of the delivery of humanitarian aid, in light of the obligation included in Article 18(2) AP II and in Customary IHL.¹⁶

The second in this series of policy papers will be launched in mid-June. For further enquires on this, or the starvation programme more generally, contact catrionamurdoch@globalrightscompliance.co.uk.

¹ Art. 54(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I) and Art. 14 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (AP II).

² Art. 14 AP II and Rule 53, ICRC Customary IHL Database, 2005, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul (last visited 2 May 2019).

³ *ibid.*

⁴ K. Dörmann, L. Doswald-Beck, and R. Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2003), online publication, 2009, available at http://www.mpil.de/files/pdf3/mpunyb_doermann_7.pdf (last visited 19 May 2019); see also O. Triffterer and K. Ambos (eds), *The*

Rome Statute of the International Criminal Court: A Commentary (3rd edn., C.H. Beck, Hart, Nomos, 2016) at 510; W. A. Schabas, *An Introduction to the International Criminal Court* (5th edn., Cambridge University Press, 2017) at 285.

⁵ Annex IV Non-paper submitted by Switzerland: proposed amendments to article 8 of the Rome Statute on the inclusion of starvation as a war crime in non-international armed conflicts, ICC-ASP/17/35, 20 September 2018, § 11, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-35-ENG.pdf (last visited 2 May 2019).

⁶ *Ibid.*

⁷ The proposal in its current form does not include reference to the Geneva Conventions as it does under Article 8(2)(b)(xxv) ICC Statute, given that, save for Common Article 3 to the Geneva Conventions, these are not applicable in a NIAC.

⁸ Whilst an amendment of Article 8(2)(b)(xxv) would offer a useful avenue for prosecuting future starvation crimes, due to the principle of non-retroactivity, the amendment is unlikely to cover prosecutions of past starvation crimes at the ICC. The Rome Statute precludes criminal responsibility under the Rome Statute “unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.” Article 22, ICC Statute.

⁹ SC Res. 1265 (1999) was the UNSC’s first thematic resolution on the protection of civilians in armed conflict, condemning the targeting of civilians, calling for respect for IHL, refugee law and IHRL and expressing willingness to take measures to ensure compliance amongst other commitments to better address the impact of conflict on civilians. The UNSC has progressively identified the protection of civilians in armed conflict as being a core part of this mandate in a number of UNSC Resolutions (see <https://poc-aide-memoire.unocha.org/about>).

¹⁰ In SC Res 2417 (2018), para. 13, the UNSC requested the Secretary General “to brief the Security Council every 12 months on the implementation of this resolution within his annual briefing on the protection of civilians”, inserting the issue of conflict and hunger in the Protection of Civilians agenda.

¹¹ Arts 48 and 52(1) AP I, Rules 1 and 7 ICRC Customary IHL Database.

¹² Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-1-AR72), Appeals Chamber, 2 October 1995, § 119.

¹³ D. Guilfoyle, *Reforming the International Criminal Court: Is it Time for the Assembly of State Parties to be the adults in the room?* EJIL: Talk! 8 May 2019, available at: www.ejiltalk.org/reforming-the-international-criminal-court-is-it-time-for-the-assembly-of-state-parties-to-be-the-adults-in-the-room/ (last visited 29 May 2019).

¹⁴ Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser, Tiina Intelman, *The International Criminal Court needs fixing*, *The Atlantic*, 24 April 2019, available at: <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing> (last visited 29 May 2019).

¹⁵ This change in the wording is due to a mere technicality, inserted to ensure a correct reference of the prohibition of starvation in the context of internal conflicts, where the Geneva Conventions of 1949 do not apply (apart from Common Article 3 to the Geneva Conventions).

¹⁶ Rule 55, ICRC Customary IHL Database, 2005.