

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

June 2019 Policy Paper in Support of the Proposed Amendment:

Paper 2 of 3



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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. The first policy paper on the proposed amendment relating to the Protection of Civilians was launched in May.

Starvation tactics are occurring with increasing fervor globally with most instances occurring today 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, and is criminalised under customary international law (CIL).² This reflects the identical human cost of the crime, regardless of the characterisation of the conflict. Yet the Rome Statute only criminalises starvation in a IAC.

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. The language proposed mirrors almost identically the crime as it is drafted in Article 8(2)(b)(xxv) save for a minor technical correction.³ The proposal has been deferred to the 18th session of the Assembly of State Parties to the Rome Statute (December 2019).⁴

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

Reason Two: Legal Consistency

There exists significant grey areas between permissible and impermissible conduct concerning starvation and the obstruction of humanitarian aid. The uncertainty surrounding what may constitute the crime of starvation in practice inhibits those investigating these crimes, those seeking to leverage access into conflict zones, and those seeking to place political pressure on belligerent states and warring parties. For too long this has created an 'ethics free zone' in conflict. The gap in the current legal framework perpetuates these grey areas.

The use of starvation of civilians as a method of warfare has been prohibited under both conflict designations in IHL since 1977.⁵ The prohibition has evolved and is now considered to be part of CIL and has been incorporated into a range of authoritative military manuals, including by countries not party to the Protocol.⁶ The Statute of The African Court of Justice and Human Rights ('the Malabo Protocol')⁷ also criminalises it in both a NIAC and IAC.

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 or why it departed from the aforementioned position under IHL and CIL.⁸ 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, leaving some to conclude the omission was unintentional.⁹ There appears as a matter of legal analysis no

rational basis for the failure to criminalise starvation in a NIAC under the Rome Statute and thus no rational basis with which to oppose the amendment.

The United Nations (UN) Security Council (SC) Resolution S/RES/2417 (UNSC 2417) championed by The Kingdom of the Netherlands, and passed unanimously in May 2018, highlights the war crime of starvation and implores member states to prevent, prohibit and hold to account those who commit the crime. Significantly UNSC 2417 makes no distinction between an IAC and NIAC and following its passing the Netherlands amended their own criminal legislation to remove the distinction. On the national level, starvation is criminalised across approximately eight national jurisdictions as a crime in both a NIAC and an IAC.¹⁰

Ensuring legal consistency across the relevant legal frameworks is essential to increase accountability and to clarify the parameters of the prohibition in the theatre of war. As noted, the proposed Swiss amendment does no more than reflect the position in IHL and CIL. Of the 168 State Parties who have signed Additional Protocol II (AP II), which clearly prohibits the use of starvation in a NIAC, 122 of those State Parties have also ratified the ICC Rome Statute.

At a time when the ICC faces further criticism, the Rome Statute sits as a legal pariah amidst a plethora of consistent legal frameworks relating to starvation. This may further exacerbate its critics, providing them with more ammunition with which to undermine the ICC. This amendment offers an opportunity to strengthen the ICC and ensure it remains in step with other countries and accountability bodies.

Countering the Pushback

There is in general strong support for the substance of the proposal from the majority of State delegates with some expressing their wish to have had it considered at the 17th session of the ASP in 2018. The Special Rapporteur for Food has also called for the amendment to enhance the protection of civilians.¹¹ Notwithstanding this, some reservations have been raised, in this second policy paper we will consider briefly the concerns relating to the possible fragmentation of the Rome Statute.

Some States have expressed concern that amendments to the Rome Statute may result in a fragmented and confusing regime with some citing to previous amendments not being widely ratified by States, leading to the situation where different crimes apply in different situations to different individuals. The Non-paper submitted by Switzerland ably addresses these concerns. It should be noted that such fragmentation was of course contemplated by the drafters of the Rome Statute explicitly through Article 121(5) and the State parties did not raise any substantive pushback at that point.

Moreover, much of the issue of fragmentation appears to have arisen out of the Belgian proposal seeking to amend four war crimes (some were adopted in 2010 and the rest in 2017) which were controversial due to the questionable status of those crimes in CIL. The same does not hold for starvation which is, as discussed above, widely accepted as having CIL status. As set out in this paper, this amendment would enhance efforts towards universality and ensure legal consistency across the relevant legal frameworks, which in turn would strengthen accountability and the protection of civilians. Fragmentation is not a sufficiently strong reason to oppose the amendment and further can be resolved by State parties themselves who hold the power to widely and uniformly ratify amendments.

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.¹² 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.¹³

The third in this series of policy papers will be launched in July. For further enquires on this, or the starvation programme more generally, contact catrionamurdoch@globalrightscompliance.co.uk. For access to the first policy paper on the Protection of Civilians see the resource section on www.starvationaccountability.org

ENDNOTES

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 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). The first criminalisation of the crime of starvation at the international level was recognised in the 1919 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was a commission established at the Paris Peace Conference, which listed ‘deliberate starvation of civilians’ as a violation of the laws and customs of war subject to criminal prosecution. See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 29 March 1919, reprinted in 14(½) *American Journal of International Law* (1920), at 144.

³ 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.

⁴ 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.

⁵ 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).

⁶ Argentina Law of War Manual (1989) *Leyes de Guerra*, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa, 23 April 1990, § 9); Australia LOAC Manual (2006) *The Manual of the Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, 10-11; Benin (Military Manual (1995) *Le Droit de la Guerre*, III fascicules, Forces Armées du Bénin, Ministère de la Défense nationale, 1995. § 13; Canada (LOAC Manual (2001) *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001. § 14); Colombia (Directive on IHL (1993) *Normas de Derecho Internacional Humanitario*, Directiva Permanente No. 017, Ministerio de Defensa Nacional, 17 August 1993. § 15; Croatia (Instructions on Basic Rules of IHL (1993 Instructions “Basic Rules of International Humanitarian Law Applicable in Armed Conflicts”, Republic of Croatia, Ministry of Defence, 1993, §16; France (OAC Manual (2001) *Manuel de droit des conflits armés*, Ministère de la Défense, Direction des Affaires Juridiques, Sous-Direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés, 2001 § 18; Germany (IHL Manual (1996), ZDV 15/1, *Humanitäres Völkerrecht in bewaffneten Konflikten – Grundsätze*, DSK VV230120023, Bundesministerium der Verteidigung, June 1996. § 19; Hungary (Military Manual (1992) *A Hadjog, Jegyzet a Katonai, Főiskolák Hallgatói Részére, Magyar Honvédség Szolnoki Repülőtiszt Főiskola*, 1992. § 20; Kenya (LOAC Manual (1997) *Law of Armed Conflict, Military Basic Course (ORS)*, 4 Précis, The School of Military Police. § 23; Republic of Korea (Military Law Manual (1996) *Military Law Manual*, 1996. § 24L Madagascar (Military Manual (1994) *Le Droit des Conflits Armés*, Ministère des Forces Armées, August 1994. § 25; Netherlands *Ibid* § 26; New Zealand (Military Manual (2005) *Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst*, 2005, § 27; Nigeria (Military Manual (1994) *International Humanitarian Law (IHL)*, Directorate of Legal Services, Nigerian Army, 1994, § 28; Russian Federation (Military Manual (1990), *Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR*, Appendix to Order of the USSR Defence Minister No. 75, 1990, § 29); Spain (LOAC Manual (2007) *Orientaciones. El Derecho de los Conflictos Armados*, Tomo 1, Publicación OR7-004 (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, § 30); Togo (Military Manual (1996) *Le Droit de la Guerre*, III fascicules, Etat-major Général des Forces Armées Togolaises, Ministère de la Défense nationale, 1996, § 33); and the Former Yugoslavia (Military Manual (1988) *Propisi o Primeri Pravila Medjunarodnog Ratnog Prava u Oruzanim Snagama SFRJ, PrU-2, Savezni Sekretarijat za Narodnu Odbranu (Pravna Uprava)*, 1988, § 36.

⁷ Article 28 D War Crimes (e) (xvi).

⁸ 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.

⁹ 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), see footnote 10.

¹⁰ Croatia, Criminal Code (2011), Article 91. available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2011_11_125_2498.html; Netherlands, International Crimes Act, 2003, Article 5(5)(l), (amended 2018), available at: https://iccdb.hrlc.net/documents/implementations/pdf/Netherlands_ICC_Implementation_Act_2002.pdf; Republic of Korea, Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007), Article 13, available from <https://cjad.nottingham.ac.uk/en/legislation/206/>; Germany *Law Introducing the International Crimes Code (2002)*, Section 11(1)(5), available at: <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf>; France, Criminal Code, Article 461-1, 461-25, (consolidated version up to November 2017), available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719>; Nicaragua, Draft Penal Code [1999] Article 463 relating to the impediment of humanitarian aid; and El Salvador, Draft Amendments to the Penal Code [1998], Article entitled ‘Omission y obstaculización de medidas de socorro y asistencia humanitaria’ relating to the impediment of humanitarian aid, Nicaragua and El Salvador taken from Henckaerts, Doswald-Beck, Alvermann, (2005), *Customary International Humanitarian Law, Volume I Practice*. There are approximately 22 countries which reference starvation or willfully impeding humanitarian access in their criminal legislation but do not specify whether the conduct is criminalized in a NIAC or IAC. Approximately 8 countries follow the ICC and feature the crime only in a IAC (Australia, Georgia, Iraq, Mali, New Zealand, Slovenia, Trinidad and Tobago, and The United Kingdom)

¹¹ UN Human Rights Council, Interim report of the Special Rapporteur on the right to food, 21 July 2017, A/72/188, para. 97(b).

¹² 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).

¹³ Rule 55, ICRC Customary IHL Database, 2005.

