

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

July 2019 Policy Paper in Support of the Proposed Amendment:

Paper 3 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. The second policy paper relating to the Legal Consistency of the Amendment was launched in June.

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 Three: Accountability

Ensuring accountability for the war crime of starvation is a fundamental pillar in deterring conflict-induced hunger. Providing for an adequate response to starvation crimes will serve to shift the prevailing narrative surrounding man-made starvation, which considers famine as a derivative of war, rather than an unlawful act which violates the fundamental right to food of civilians. Starvation crimes must be considered morally toxic, and holding the perpetrators of such crimes accountable is the first step to ensure such a shift.

Accountability will also ensure that crimes related to deprivations of food and other objects indispensable for the survival of the population are labelled clearly. A vital step in this is to encourage prosecutions that label the criminal conduct appropriately.

The proposed amendment could act as a signal to accountability mechanisms on the national or regional level that starvation is a crime worthy of attention and investigation, which whilst not leading to prosecutions immediately may serve to preserve evidence for future prosecutions or dossiers.

Under the Rome Statute, starvation as a war crime is only available in international armed conflicts and not in non-international armed conflicts (NIACs). As a matter of legal analysis, this is a distinction apparently without any rational legal basis. In practice, this lacuna acts to seriously limit the Rome Statute's ability to allow relevant and effective prosecutions and achieve much needed accountability for contemporary starvation. Unfortunately, as most (if not all) instances of starvation occurring today are in the context of NIACs, 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.

Amending the Rome Statute to fill the accountability gap and include Starvation in NIACs, will not only ensure harmony in the current legal framework, but will also ensure that victims who suffer from conflict-induced hunger have the right to access to justice and to seek redress. Victims of war crimes in NIACs are entitled to justice as much as victims of the same crime in IACs, and ensuring uniformity is one of the aims of international law, which does not provide for any differential treatment among victims of different types of conflicts.

The amendment to the ICC Statute could also serve as a springboard for the amendment of national legislations, which will seek to conform to the amended Rome Statute. Presently, several domestic legislations criminalise war crimes by merely reproducing the offences as they are included in the Rome Statute or by referencing to the crimes included in the Statute itself.⁵ The purpose of such implementing legislations is two-fold: first, to criminalise in national law those offences that fall under the jurisdiction of the ICC; and, second, to ensure that States can cooperate with the ICC by way of surrendering a suspect or assisting in an investigation.

If adopted, the proposed amendment will encourage states to mirror these legal provisions at national level, enabling States to exercise domestic jurisdiction over such crime. By way of an analogy, the Netherlands after the unanimous adoption of UN Security Council Resolution 2417(2018) amended its domestic legislation and to include the war crime of starvation for NIACs.⁶ A similar approach has already been taken by some State parties to the ICC: after the

introduction of the crime of aggression in the Rome Statute, four States have incorporated such crime in in their penal codes.⁷

Countering the Pushback

Some reservations have been raised with regard to the language used in the proposed amendment. In the current proposal the language mirrors almost identically the crime as it is drafted in Article 8(2)(b)(xxv), save for a minor technical correction. 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.

The proposal is therefore accurately omitting a reference to an instrument which has no concrete application in the context of internal conflicts. However, some concerns have been raised that this omission might broaden the scope of application of Article 8. Such concerns can be swiftly allayed, the amendment to the Rome State will include a prohibition of the crime of starvation under the Article 8, which only relates to crimes committed in the context of armed conflicts.⁸ Outside the framework of armed confrontations the proposed war crime of starvation would have no application.

A second set of reservations have outlined how the proposal should rather include reference to the Second Additional Protocol to the Geneva Conventions (AP II). Whilst it is legally accurate to reference this instrument, which, contrary to the Geneva Conventions, is applicable for NIACs, it would significantly limit the current the scope of application of the prohibition of Starvation. AP II only includes one provision relating to the provision of humanitarian aid (article 18(2) AP II), whilst the current legal framework applicable to humanitarian operations is much more detailed under customary international law.⁹ As an example, AP II, contrary to the IHL customary framework,¹⁰ does not require the passage of humanitarian relief to be “rapid and unimpeded”. A rigid interpretation of article 18(2) AP II could therefore lead parties to consider impositions of undue delays in the delivery of humanitarian relief as legitimate behaviour. This interpretation could lead to grave results, with food deliveries being stalled for months, becoming unusable, without leading to the responsibility of the obstructing party. The inclusion of AP II would undoubtedly make the work of humanitarian agencies delivering food aid more complex.

Moreover, referencing AP II would raise some difficulties vis à vis state parties to the Rome Statute who have not ratified AP II. Contrary to the Geneva Conventions, which have been universally ratified, AP II has indeed received a fewer number of ratifications.¹¹ In order to avoid such confusion, it is logical to omit any reference to AP II, as reflected in the current proposal.

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 behaviour 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

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(1/2) 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 See e.g. United Kingdom, International Criminal Court Act 2001, Ireland, International Criminal Court Act 2006, New Zealand, International Criminal Court Act 2000.

⁶ Netherlands, International Crimes Act, 2003, Article 6(3), (amended 2018), available at: <https://wetten.overheid.nl/BWBR0015252/2018-09-19>

⁷ Luxembourg, Slovenia, Croatia and Czech Republic. For more info see: <https://www.pgaction.org/ilhr/rome-statute/implementing-legislation.html>

⁸ Article 8(2)(b) ICC Statute.

⁹ Rule 55 ICRC Study on Customary IHL. The customary rule requires the passage of humanitarian relief to be "rapid and unimpeded" whilst this requirement is not included in Article 18(2) APII.

¹⁰ Rule 55 ICRC Study on Customary IHL.

¹¹ For the list of State Parties to AP II, see: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475

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 Study on Customary IHL.