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Report of the Working Group on Amendments
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I. Introduction

1. The present report is submitted pursuant to the mandate given by the Assembly of State Parties (“the Assembly”) to the Working Group on Amendments (“the Working Group”). The Working Group was established by Assembly resolution ICC-ASP/8/Res.6 for the purpose of considering amendments to the Rome Statute proposed in accordance with article 121, paragraph 1, of the Statute as well as any other possible amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be adopted in accordance with the Rome Statute and the Rules of Procedure of the Assembly.
2. The Working Group’s consideration of amendment proposals to the Rome Statute and to the Rules of Procedure and Evidence is governed by the Terms of Reference set out in Assembly resolution ICC-ASP/11/Res.8, annex II. The amendment procedure for the Rules of Procedure and Evidence is also governed by the “Roadmap on reviewing the criminal procedures of the International Criminal Court”, the main purpose of which is to facilitate a structured dialogue between key stakeholders on proposed amendments to the Rules of Procedure and Evidence.¹ In endorsing the Roadmap by resolutions ICC-ASP/11/Res.8 and ICC-ASP/12/Res.8, the Assembly has reaffirmed the role of the Working Group in receiving and considering recommendations to the Assembly on proposals of amendments to the Rules of Procedure and Evidence.
3. At its seventeenth session, the Assembly invited the Working Group to continue its consideration of all amendment proposals in accordance with the Terms of Reference of the Working Group, and requested the Working Group to submit a report for the consideration of the Assembly at its eighteenth session.²
4. On 7 February 2019, the Bureau reappointed Ambassador Juan Sandoval Mendiola (Mexico) as Chairperson of the Working Group.³
5. The Working Group met on 10 May 2019 to commence its work. Cognizant of the importance of holding regular meetings, the Working Group agreed to meet approximately every six weeks. It held six intersessional meetings, on 17 May, 1 July, 3 October, 24 October and 25 November 2019.

II. Consideration of proposals to amend the Rome Statute

6. The Working Group had before it those amendment proposals previously referred to it by the Assembly at its eighth session, as well as those transmitted by the Depositary of the Rome Statute on 14 March 2014, 15 August 2017 and 30 August 2019.⁴ It also had before it the non-paper submitted by Switzerland on 19 April 2018, revised on 20 September, containing proposed amendments relating to article 8 of the Rome Statute.⁵
7. As in the past, proponents were given the opportunity, at each meeting of the Working Group, to provide updates on their proposals. All delegations were invited to comment on the different proposals before the Working Group.

¹ The Roadmap is contained in the Report of the Bureau on the Study Group on Governance to the eleventh session of the Assembly (ICC-ASP/11/31, annex I). The Revised Roadmap is contained in the Report of the Bureau on the Study Group on Governance to the twelfth session of the Assembly (ICC-ASP/12/37, annex I). The Roadmaps are respectively available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-ENG.pdf and at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-ENG.pdf.

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixteenth session, The Hague, 4–14 December 2017* (ICC-ASP/16/20), vol. I, part III, ICC-ASP/16/Res.6, annex I, paras. 18(a) and (b), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-20-ENG-OR-vol-I.pdf or at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res6-ENG.pdf.

³ Decision of the Bureau of the Assembly of States Parties, 7 February 2019, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-2019-Bureau-1-b.pdf.

⁴ These amendment proposals are contained: in the Report of the Working Group on Amendments to the thirteenth session of the Assembly (ICC-ASP/13/31); on the website of the Assembly at https://asp.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx; and, having been notified to the Depositary, at the United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en.

⁵ The non-paper also included a proposal on elements of crimes relating to the proposed amendments to article 8 of the Rome Statute. Both the text of the proposed amendments and the non-paper are included respectively in annexes III and IV of the present report.

8. As a reflection of the discussions held during the previous reporting period, the Working Group considered and adopted the calendar of planned meetings for 2019 by consensus in the first meeting held on 10 May 2019, which originally included four meetings, two of which were opened only to States Parties and two opened to Observer States and civil society. States welcomed the reflection of open meetings in the calendar. Civil society representatives requested their continued participation in meetings of the Working Group.

A. Switzerland

9. At the first meeting, on 10 May 2019, Switzerland provided updates on its proposal of amendments to article 8 of the Rome Statute on the “Inclusion of starvation as a war crime in non-international armed conflicts (NIAC) into the Rome Statute”.⁶ Switzerland explained that intentionally using starvation of civilians as a method of warfare was the prime example of a serious violation of international humanitarian law in both types of armed conflict, which the Rome Statute, however, only criminalized in international armed conflict (IAC). Switzerland stated that its proposal was in line with current international law, in particular international humanitarian law, and it would contribute to the coherence and harmonization of the Rome Statute. Switzerland further stated that, from the perspective of victims of starvation, the types of conflicts might not matter, and in reality, the large majority of instances of the crime were being committed in non-international armed conflicts, which made the Security Council recognize the importance of prohibition in its resolution 2417 adopted on 24 May 2018.⁷ Switzerland found that there was no objection among States Parties on the substance of the proposal, and while its adoption might have posed timing issues last year, now was the right timing to discuss with an aim to presenting it to the Assembly this year. The Working Group decided to continue its consideration of this proposal at the next meeting.

10. At the second meeting, on 17 May 2019, many delegations noted that the Swiss proposal was timely and would contribute to the harmonization of the Rome Statute by further closing the gap between the rules for IAC and those for NIAC. Delegations generally agreed that the protection of civilians was a central principle of international humanitarian law and the Rome Statute, and there was no justification for distinguishing the protection of civilians from starvation in IAC and NIAC. Some suggested that its omission from the Rome Statute had been largely due to an oversight on the part of the drafters. Others expressed concerns about successive amendments to the Rome Statute that might lead to fragmentation and impair its universality and the unity of the Statute system as a whole. It was argued that the Rome Statute already covered the deliberate starvation of civilians in NIAC. It was also stated that the proposal might be viewed as a political tool by some regions where starvation was an acute problem. Views were also expressed that any amendment might not be desirable while intense discussions about the reform of the Court were ongoing. However, other delegations indicated that the Rome Statute had foreseen the possibility of amendments as agreed by sovereign States, and the adoption of the proposal will contribute to strengthening the Statute. The Chair noted that the Rome Statute was designed to accommodate the progressive nature of international criminal law and the Working Group was mandated to review and reflect current developments in this regard. An issue was raised about the difficulty of domestic legislative procedures, to which issue a response was made that there was no obligation to ratify an amendment under the Rome Statute. The Working Group decided to continue its consideration of this proposal at the next meeting.

⁶ Ibid.

⁷ Resolution 2417 (2018), adopted by the United Nations Security Council at its 8267th meeting, on 24 May 2018, available at [https://undocs.org/S/RES/2417\(2018\)](https://undocs.org/S/RES/2417(2018)).

11. At the third meeting, on 1 July 2019, Switzerland stated that it had found in the process of consultations positive reactions with no objection to the substance of the proposal, while still recognizing concerns about timing and other challenges that the Court was facing. Many delegations, in response, supported the proposal and would like it to be considered at the eighteenth session of the Assembly. Some of them emphasized the current situation that more than half of the victims suffering from hunger were found in conflict zones, and the majority of contemporary armed conflicts were internal. It was informed that their domestic laws did not distinguish the criminalization of starvation in IAC and NIAC. However, other delegations, while recognizing the importance of the substance of the proposal, expressed concerns about fragmentation and the universality of the Rome Statute due to the frequency of amendments, as well as about the right timing due to current challenges and ongoing discussions on the review of the Court. It was suggested that the Working Group should have a better structure in debating on potential needs for amendments. A view was expressed that the Court should focus on core crimes. Some other delegations took the middle ground that, while being aware of concerns about fragmentation and the unity of the Rome Statute system, they supported the particular proposal because it addressed the real gap in the Statute and would reinforce the Rome Statute system. The Chair encouraged States Parties to continue consultations with the aim of determining whether the Working Group would conclude discussions at the eighteenth session of the Assembly. The Working Group decided to continue its consideration of the Swiss proposal.

12. At the fourth meeting, on 3 October 2019 meeting, Switzerland announced that it had deposited its proposal with the Secretary-General of the United Nations on 30 August 2017⁸ and presented a draft resolution with a view to its consideration at the eighteenth session of the Assembly. Switzerland also reported the outcome of its consultations, that most States Parties, including approximately 50 supporters of its proposal, acknowledged the need for the prohibition of starvation of civilians as a method of warfare in NIAC. In response, many delegations expressed their support for the adoption of the proposal at the eighteenth session as it would fill gaps in relevant international law and serve the interest of victims. Other delegations, however, still raised concerns about possible fragmentation and risks to the unity and stability of the Rome Statute system due to the proliferation of amendments. Others stated that fragmentation could be avoided by actively ratifying amendments and that the stability of the Rome Statute system did not depend on avoiding amendments but by discussions among State Parties, Observers and civil society, even in a difficult period for the Court. They expressed the view that the issue of fragmentation could better be discussed as part of the ongoing review process. Some delegations stated that amendments adopted so far had not enjoyed a high number of ratifications and that States Parties should focus more on what already existed in the Rome Statute. A view was expressed that considering the mixture of support and concern, the Working Group could be flexible in deciding upon the best timing to adopt this proposal. A few delegations indicated that their capitals were still considering the proposal. The Working Group decided to continue its consideration of this proposal at the next meeting.

13. At the fifth meeting, on 24 October 2019, the Chair stated that considering the consensus among the Working Group on the substance of the proposal submitted by Switzerland, he would like to propose the text of recommendations and asked the Working Group if they wished to adopt a draft resolution amending the Rome Statute at the eighteenth session of the Assembly. In response, delegates expressed support for the Chair's way forward with the recommendations as annexed by the draft resolution. Some delegations stated that in this particular case, concerns about fragmentation and the unity and stability of the Rome Statute system were outweighed by the substantive importance of the proposal. Regarding the outcome of discussions, many delegations supported the current draft recommendations and resolution. Some delegations indicated their preference to reflect their concerns about fragmentation and the unity and stability of the Rome Statute system in the text of the resolution submitted by Switzerland. Others expressed the view that the report of the Working Group was the right place to register these concerns in order to avoid affecting the substance of the resolution. One delegation stated that its capital was still considering the proposal, and thus it would reserve its position pending an instruction.

⁸ The depository notification is available at <https://treaties.un.org/doc/Publication/CN/2019/CN.399.2019-Eng.pdf>.

A point of order was raised that since there was no objection in the room regarding the proposal, it would be no longer appropriate to repeat same discussions in this forum. The Chair stated that it was the past practice to reflect different views in the report, while he intended to propose another draft recommendation to address the concerns raised. The Chair also stated that while he admitted that the text of the resolution was open for negotiations, he was of the view that the nature of a resolution in the context of the Working Group was to simply include the language of proposed amendments. The Chair requested interested delegates to consult and propose the intended text in writing.

14. At the sixth meeting, on 25 November 2019 meeting, , the Working Group decided to recommend that the Assembly adopt the resolution amending article 8, paragraph 2 (e), of the Rome Statute (annex I) and adopted the report of the Working Group.

B. Belgium

15. At the first meeting, on 10 May 2019, Belgium announced that three out of four proposals of amendments to article 8 of the Rome Statute which it had proposed in 2009 in relation to war crimes were adopted at the sixteenth session of the Assembly in the spirit of compromise, and called for their ratification. Belgium stated that it would continue its effort to criminalize the use of anti-personnel mines and requested that the relevant proposal remain on the table. Some delegations expressed their strong support and wish to see the adoption of this proposal.

C. Mexico

16. At the first meeting, on 10 May 2019, Mexico indicated that it intended to discuss its amendment proposal at a later stage, taking into consideration the progress related to the adoption on 7 July 2017 of the Treaty on the Prohibition of Nuclear Weapons.

D. Trinidad and Tobago

17. No further updates were provided by Trinidad and Tobago concerning its proposal during the intersessional period.

E. South Africa

18. No further updates were provided by South Africa concerning its proposal during the intersessional period.

F. Kenya

19. No further updates were provided by Kenya concerning its proposal during the intersessional period.

III. Consideration of proposals to amend the Rules of Procedure and Evidence

A. Provisional amendment to rule 165

20. No delegation provided any further update on the issue.

B. Proposed amendment to rule 76 (3)

21. No delegation provided any further update on the issue.

IV. Information on the status of ratifications of the Kampala amendments to the Rome Statute as well as on the amendments adopted at the fourteenth and sixteenth sessions of the Assembly

22. The Working Group was kept regularly informed of any ratifications of the amendments to the Rome Statute adopted at the 2010 Review Conference, the fourteenth session and the sixteenth session of the Assembly. Since the submission of its last report, Paraguay had ratified the Kampala amendment relating to article 8 of the Rome Statute; Ecuador and Paraguay had ratified the Kampala amendments on the crime of aggression; Belgium, Slovenia and Switzerland had ratified the amendment to article 124 of the Rome Statute; Luxemburg and Slovakia had ratified the three amendments to article 8, paragraph 2 (b) and to article 8, paragraph 2 (e), of the Rome Statute.⁹

23. As of 11 November 2019, the Kampala amendment to article 8 had been ratified by 38 States Parties,¹⁰ the Kampala amendments on the crime of aggression had been ratified by 39 States Parties,¹¹ the amendment to article 124 had been ratified by 13 States Parties¹² and the three amendments to article 8, paragraph 2 (b) and to article 8, paragraph 2 (e) has been ratified respectively by two States Parties.¹³

V. Decisions and recommendations

24. The Working Group recommends to the Assembly the adoption of a draft resolution on amending article 8 of the Rome Statute of the International Criminal Court to include the war crime of the starvation of civilians as a method of warfare in non-international armed conflict, as article 8-2-e)-xix) (annex I).

25. The Working Group recognizes the importance of the continued consideration of the impacts that successive amendments have on the relevance and integrity of the Rome Statute.

26. The Working Group recognizes in this regard that the crime referred to in article 8-2-e)-xix), is accepted by all States Parties as one that requires timely action by States Parties to address this crime in this context.

27. The Working Group recommends that regular meetings be held throughout 2020, including, if necessary, in expert meetings format.

28. The Working Group concludes its intersessional work by recommending to the Assembly the inclusion in the omnibus resolution of five paragraphs (annex II).

⁹ The list of the States that ratified relevant amendments is available at the United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

¹⁰ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-a&chapter=18&clang=_en.

¹¹ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en.

¹² https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-c&chapter=18&clang=_en.

¹³ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-d&chapter=18&clang=_en; https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-e&chapter=18&clang=_en; https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-f&chapter=18&clang=_en.

Annex I

Draft resolution on amendments to article 8 of the Rome Statute of the International Criminal Court

The Assembly of the States Parties

Noting article 121, paragraphs 1 and 2, of the Rome Statute of the International Criminal Court which permits the Assembly of States Parties to adopt any proposed amendment to the Rome Statute after the expiry of seven years from the entry into force of the Statute,

Noting also article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted this amendment applies also in respect of States that are not parties to the Statute,

Confirming that, in light of the provision of article 40, paragraph 5, of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendments contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute,

Noting article 9 of the Statute on the Elements of Crimes which states that such Elements shall assist the Court in the interpretation and application of the provisions of the crimes within its jurisdiction,

Considering that the crime referred to in article 8, paragraph 2 (e) (ix) is a serious violation of the laws and customs applicable in armed conflict not of an international character,

Noting that the crime referred to in article 8, paragraph 2 (e) (ix) is without prejudice to the Second Additional Protocol of 8 June 1977 to the Geneva Conventions,

1. *Decides* to adopt the amendment to article 8, paragraph 2 (e), of the Rome Statute of the International Criminal Court contained in appendix I to the present resolution, which is subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5, of the Statute;
2. *Also decides* to adopt the relevant elements to be added to the Elements of Crimes, as contained in appendix II to the present resolution;
3. *Calls upon* all States Parties to ratify or accept this amendment to article 8;
4. *Urges* all States that have not done so to ratify or accede to the Rome Statute, and in doing so to also ratify or accept the amendments to article 8.

Appendix I

Amendment to be inserted as article 8-2-e)-xix) of the Rome Statute

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies.

Appendix II

Elements of crime of new article 8-2-e)-xix) of the Rome Statute

1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Annex II

Draft text for the omnibus resolution

1. Paragraph 152 of the 2018 omnibus resolution (ICC-ASP/17/Res.5) remains unchanged, reading:

“*Welcomes* the report of the Working Group on Amendments.”

2. Paragraph 153 of the 2018 omnibus resolution (ICC-ASP/17/Res.5) would read:

“*Recognizes* the importance of the continued consideration of the impacts that successive amendments have on the relevance and integrity of the Rome Statute.”

3. Paragraph 154 of the 2018 omnibus resolution (ICC-ASP/17/Res.5) would read:

“*Recognizes* in this regard that the crime referred to in article 8-2-e)-xix), is accepted by all States Parties as one that requires timely action by States Parties to address this crime in this context.”

4. Paragraph 154bis of the 2018 omnibus resolution (ICC-ASP/17/Res.5) would read:

“*Calls upon* all States Parties to ratify or accept the amendment to article 8 regarding the war crime of the starvation of civilians as a method of warfare in non-international armed conflict.”

5. Paragraph 18 of annex I (mandates) of the 2018 omnibus resolution (ICC-ASP/17/Res.5) is replaced by the following:

“(a) *invites* the Working Group to continue its consideration of all amendment proposals, in accordance with the Terms of Reference of the Working Group; and

(b) *requests* the Working Group to submit a report for the consideration of the Assembly at its nineteenth session;”

Annex III

Amendments to article 8 of the Rome Statute proposed by Switzerland

A. Amendment to article 8 of the Rome Statute

To be inserted as new subparagraph to article 8(2)(e)

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies.

B. Elements of crimes

New subparagraph to article 8(2)(e)

War crime of starvation as a method of warfare

Elements

1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

A. Introduction

1. Under article 8 of the Rome Statute, the International Criminal Court (ICC) has jurisdiction to investigate and prosecute individuals charged with war crimes. For this purpose, article 8 distinguishes between international armed conflicts (IAC) and non-international armed conflicts (NIAC). Acts punishable under the Rome Statute as war crimes are mainly but not always identical in IAC and NIAC.

2. While a distinction between IAC and NIAC is legally justified for certain war crimes, this is not always the case. In fact, some of the “serious violations of the laws and customs” are considered to constitute war crimes under international law in both IAC and NIAC, but the Rome Statute nonetheless only penalizes them in IAC. A prime example is the crime of intentionally using starvation of civilians as a method of warfare.

B. Broad recognition in international law

3. In NIAC, using starvation of civilians as a method of warfare is prohibited by article 14 of Additional Protocol II of the Geneva Conventions (AP II),¹ ratified by 168 States. The prohibition also amounts to a rule of customary international humanitarian law (CIHL) as evidence of a general practice accepted as law. For example, it has been included in national laws and military manuals applicable in NIAC as well as affirmed by relevant judgments. The customary nature of the rule is supported by public declarations and the reported practice of States.²

4. The prohibition of starvation in NIAC is reinforced by several corollary rules of IHL. These include the prohibition of attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population³ and the rules relating to humanitarian relief actions and access.⁴ This means that attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population or denying access of humanitarian relief intended for civilians in need, including deliberately impeding humanitarian aid or restricting the freedom of movement of humanitarian relief personnel, may constitute violations of the prohibition of starvation.⁵

¹ Article 14 of AP II: “Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.”

² See for example Rule 53 of the ICRC Study on CIHL, available online at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule53.

³ See article 14 of AP II; see also for example Rule 54 of the ICRC Study on CIHL (fn 2).

⁴ According to article 18(2) of AP II, “if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.” Moreover, under CIHL as identified in Rule 55 of the ICRC study on CIHL, “parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control” (see Rule 55 of the ICRC study on CIHL (fn 2)). Concerning humanitarian relief personnel, under CIHL as identified in Rule 56 of the ICRC study on CIHL, “parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions”, unless imperative military necessity requires that their movements be temporarily restricted (see Rule 56 of the ICRC Study on CIHL (fn 2)).

⁵ Article 14 in combination with article 18 § 2 of APII and Rule 55 of the ICRC Study on CIHL (fn 2).

5. If the prohibition of starvation in NIAC is violated, it is considered a serious violation of IHL that gives rise to individual criminal responsibility.⁶ This is the position expressed by relevant international bodies.⁷ Thus, the crime of intentionally using starvation of civilians as a method of warfare in NIAC enjoys broad recognition in international law.

C. Gap in the Rome Statute

6. Despite this broad recognition, starvation of civilians as a method of warfare is not listed as a war crime in NIAC under the Rome Statute. It only exists in IAC under article 8(2)(b)(xxv), which defines the crime as “*intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions*”.

7. In 1998, a provision penalizing starvation in NIAC had been part of the draft Rome Statute. However, the “final package” of the Rome Statute did not include starvation in the list of war crimes in NIAC. The drafting history⁸ does not provide any specific reasons why it was not included in the final draft. In fact, there appears to have been no substantive disagreement during the Rome conference concerning the war crime of starvation in NIAC. Some drafters of the Statute instead remember that the inclusion of starvation in the list of war crimes in NIAC was supported by many delegations⁹ and that omission from the ‘final package’ is likely to have been unintentional.¹⁰ The gap remains in the Statute to this day.

D. Proposal for harmonization

8. Although prohibited under conventional and CIHL, starvation as a method of warfare has allegedly been used in a number of conflicts in recent years. This has prompted the UN Security Council to underline that this conduct may constitute a war crime – making no distinction between IAC and NIAC – and to urge States to conduct investigations and, where appropriate, to take actions against those responsible.¹¹ The Special Rapporteur on the right to food has called for an amendment of the Rome Statute to include within the ICC’s jurisdiction the war crime of using starvation of civilians as a method of warfare in NIAC.¹²

9. To harmonize the jurisdiction of the ICC with regards to war crimes in IAC and NIAC, Switzerland proposes an amendment to the Rome Statute to include the war crime of using starvation of civilians as a method of warfare in NIAC. The large majority of today’s armed conflicts being non-international in nature, this amendment would strengthen the fight against impunity by allowing the ICC to prosecute those alleged to have committed this war crime irrespective of the nature of the conflict. This would also contribute to improving the coherence of the Statute as a whole. This amendment would clearly signal the willingness of the Assembly of States Parties to further pursue criminal accountability with regard to war crimes in NIAC.

⁶ Rule 156 of the ICRC Study on CIHL (fn 2).

⁷ See the Security Council Resolution 2417 (2018) preamble and para. 10, the Report of the International Commission on Inquiry on Darfur to the Secretary-General, S/2005/60, 1st February 2005, para. 166-167, the Security Council Resolution 794 (1992), para. 5, and the statements of the Secretary-General of the United Nations, available online at: <http://www.un.org/apps/news/story.asp?NewsID=53003>, Interim report of the Special Rapporteur on the right to food, UNGA, 21 July 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/24/73/PDF/N1722473.pdf?OpenElement>, para. 84 and 97. See also ICRC in its interpretation to Rule 156 of the ICRC Study on CIHL (“Serious violations of international humanitarian law constitute war crimes”), which refers to starvation as a serious violation of IHL in NIAC.

⁸ For more information, see the official records of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC, available online at <http://legal.un.org/icc/rome/proceedings/contents.htm>.

⁹ Michael Cottier, ‘Article 8’ in Otto Triffterer, *The Rome Statute of the International Criminal Court* (2nd edition, Beck/Hart/Nomos 2008) 208.

¹⁰ This are the views of the chair of the Committee of the Whole and the chair of the Working Group on the definition of war crimes, Rogier Bartels, ‘Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and some Proposals for the Future’ (2015) 48 *Israel Law Review* 282, fn 128.

¹¹ Security Council Res. 2417 (2018), preamble and para. 10.

¹² UN Human Rights Council, Interim report of the Special Rapporteur on the right to food, 21 July 2017, A/72/188, para. 97(b).

10. If adopted, the new subparagraph to article 8(2)(e) of the Rome Statute would, in accordance with article 121(5) of the Statute, only enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. While it might raise questions with regard to a possible fragmentation of the Statute, this eventuality was contemplated by the drafters of the Rome Statute, who accepted it when drafting article 121(5) of the Statute. It is up to each State Party to ratify amendments if it wishes to limit the fragmentation of the Statute. In addition, any given situation where the ICC would have jurisdiction over the crime of starvation would contribute to rendering justice for the concerned victims. To them, the new crime would be highly relevant despite the fact that the ICC would not have jurisdiction over the same crime in other situations.

E. Draft amendment text

1. Amendment to article 8 of the Rome Statute

To be inserted as new subparagraph to article 8(2)(e)

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies.

2. Elements of crimes

New subparagraph to article 8(2)(e)

War crime of starvation as a method of warfare

Elements

1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

F. Explanation of the draft amendment text

11. The draft text is based on article 8(2)(b)(xxv) of the Rome Statute, applicable in IAC, which declares as a war crime “*intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions*”.

12. Treaty IHL governing NIACs¹³ does not explicitly refer to “willfully impeding relief supplies”. However, article 18(2) of AP II makes clear that “[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival ... relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned”. In these circumstances, a refusal to grant consent “without good grounds” is equivalent to a violation of article 14 AP II prohibiting the use of starvation as a method of warfare.¹⁴

¹³ Common article 3 and, as applicable, AP II.

¹⁴ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 1479.

13. As identified in Rule 55 of the ICRC study on CIHL,¹⁵ “parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control”. This conclusion is based on a meticulous study of military manuals, national legislation and other State practice, essentially making no distinction between IACs and NIACs in relation to the obligation to allow the passage of humanitarian relief.¹⁶ This is also supported by Resolution S/RES/2417 (2018), which emphasizes that “*willfully impeding relief supply and access for responses to conflict-induced food insecurity in situations of armed conflict, (...) may constitute a violation of international humanitarian law.*”¹⁷ It may be noted that S/RES/2417 (2018) makes at no juncture a difference between IACs and NIACs.

14. The reference “as provided for under the Geneva Conventions” was omitted because, with the exception of Common article 3, their scope of application only covers IAC. As mentioned above, the legal basis for this part of the amendment is based on CIHL.¹⁸ It is worth recalling that the amendment proposal is to be inserted as a new subparagraph to article 8(2)(e) of the Rome Statute devoted to “other serious violations of the laws and customs applicable in armed conflicts not of an international character, *within the established framework of international law*” (emphasis added). It is therefore clear that the amendment proposal falls within the existing rules of IHL applicable in non-international armed conflicts (NIAC).

15. The elements of crime are identical to those for article 8(2)(b)(xxv) of the Rome Statute relating to IAC, with the exception of paragraph 3, where the term “international armed conflict” is to be replaced with “armed conflict not of an international character”.

¹⁵ The explanation to Rule 55 makes clear that this rule does not go beyond the text of article 18(2) of Additional Protocol II, Rule 55 of the ICRC study on CIHL (fn 2).

¹⁶ See the practice relating to Rule 55 of the ICRC Study on CIHL (fn 2).

¹⁷ UNSC Res. 2417 (24 May 2018), preamble and para. 6 & 10.

¹⁸ Rules 55 and 156 of the ICRC Study on CIHL (fn 2).